In the nearly fifty years since *Sweezy*, this Court and lower courts have repeatedly reaffirmed the special importance of robust free expression in higher education.[3] In *Healy v. James*, 408 U.S. 169 (1972), this Court made clear that students are an important part of the collegiate marketplace of ideas when it ruled that a college, acting "as the instrumentality of the State, may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent." *Healy* at 187-88. *See also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

The Seventh Circuit, however, held that the rationale of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), applied to collegiate student newspapers. By placing the rights of adult university students, engaged in reporting as part of their extracurricular activities—paid for out of fees extracted from them precisely for this purpose—on the same plane as the rights of high school students writing as part of a journalism class, the Seventh Circuit gravely discounted the

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[3] *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) ("[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection'") (citations omitted); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) ("The university environment is the quintessential "marketplace of ideas," which merits full, or indeed heightened, First Amendment protection"); *Linnemeier v. Ind. Univ.—Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1034, 1042 (N.D. Ind. 2001) ("A university setting is . . . a 'hub of ideas' and a place citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth").

special status of colleges and universities. This Court has rightly never held that the nation relies on its high schools as the engines of intellectual innovation, scientific discovery and open debate, but in opinions like *Sweezy*, this Court has recognized that higher education plays precisely this role. By applying *Hazelwood*'s weak speech protections to adult students and refusing to hold administrators accountable for brazen acts of censorship, the Seventh Circuit opinion threatens the vibrancy and effectiveness of our nation's colleges and universities.

B. The Seventh Circuit mistakenly treated mandatory student activity fees as a conventional government subsidy in conflict with *Southworth* and *Rosenberger*.

The Seventh Circuit directly contradicted Supreme Court precedent by applying doctrines relevant to institutionally "subsidized" speech simply because the *Innovator* (the campus newspaper in question) received funds from the student activity fee, *Hosty*, 412 F.3d at 735. The Seventh Circuit wrongly compared speech in the *Innovator* to other speech "underwritten at public expense," and stated that "[f]reedom of speech does not imply that someone else must pay," to defend the proposition that by granting student activity fees to the paper the university may have attached university control over the paper's views. *Id.* at 735, 737. Under this Court's decisions in *Board of Regents v. Southworth*, 529 U.S. 217 (2000) and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), however, student activity fees are student funds designated to fund student speech and cannot be used by the government to control student speech.

In *Southworth*, when a group of students challenged the use of mandatory student activity fees to fund speech with which they disagreed, this Court explicitly distinguished student activity fees from direct university support, writing that "[i]f

the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. *That is not the case before us*." *Southworth*, 529 U.S. at 229 (emphasis added).

The logic behind the *Southworth* decision is compelling: students should not be forced to subsidize groups or expression they despise. If, however, as this Court explained, mandatory student activity fees are treated as a pool of student money that can only be distributed on a viewpoint-neutral basis, the fee becomes a permissible student fund for free speech in general, not for a certain approved view in particular. *Hosty*, however, treats student activity fees as if they were of the same nature as the direct government funding provided in cases like *Rust v. Sullivan*, 500 U.S. 173 (1991) and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). In cases of direct government funding, the government itself is deemed to be the speaker. However, this Court has made clear that student speech funded by student activity fees "is not that of the University or its agents." *Southworth*, 529 U.S. at 235.

Crucially, the Court held in *Southworth* that student activity fees *must* be distributed without regard to the viewpoint of the student groups receiving those fees. *Southworth*, 529 U.S. at 233. Dean Carter's viewpoint-based decision to prevent the publication of the *Innovator* because it criticized the university administration was not only a violation of GSU's own contractual promises and an impermissible prior restraint on speech, but also directly violated *Southworth*'s requirement of viewpoint neutrality.

Under the logic of *Hosty*, a state university would be responsible for—and theoretically control—the speech of all student fee recipients, including College Republicans, College Democrats, Campus Crusade for Christ, Hillel, Human Rights Campaign, and the Muslim Student Association. Ob-

viously, these groups have competing agendas and ideologies. They do not speak for the university, nor should the university be able to control their speech. However, *Hosty* gives the university just such an opportunity. The entire student fee structure is thus transformed from an engine of free speech into a pretext for institutional control.[4]

C. The Seventh Circuit erroneously applied *Hazelwood* to colleges and universities despite the profound differences in the nature and purpose of high schools and universities.

The most controversial component of the *Hosty* opinion was its decision to apply *Hazelwood* to cases involving the student media at institutions of higher education. The Seventh Circuit decided to apply a standard that ignores the dramatic differences between high school and college students and eviscerates the universally understood status the college student media has enjoyed for decades.

First, as noted above, the Seventh Circuit improperly characterized *Hazelwood* as a case primarily about school-funded speech, whereas this Court's decision in *Hazelwood* was based on far more than the school's mere financial support of the newspaper. This Court was also influenced by the fact that the school administration was sufficiently entangled with the publication of the newspaper—through editorial oversight and a written policy that the newspaper was part of the educational curriculum—that "students, parents, and members of the public might reasonably perceive [it] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. 260, 271 (1988). None of these factors were present with the *Innovator*.

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[4] It is not clear that the university could control the student-run newspaper even if using taxpayer funds; however, this issue is for another time, for in this case the funds were student activity funds assessed against the students.

Second, the *Hosty* court's decision to apply the *Hazelwood* analysis to the paper as soon as it determined the existence of any financial support ignores the relationship between public colleges and the student media that has existed for decades. *See, e.g., Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) ("[a] public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper"); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975) ("the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances"). The independent student media has long been a collegiate institution, which benefits both students and the colleges themselves.

Third, in applying the *Hazelwood* standard, the Seventh Circuit also ignored the important distinctions between high school and college students. High school students are almost exclusively minors, while college students are almost exclusively adults.[5] *See Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community"). *See also Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (holding that *Hazelwood* did not apply to college setting because college students are "young adults"); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) ("few college students are minors, and colleges are traditionally places of virtually unlimited free expression"); *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) ("[c]ollege students today are no longer minors;

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[5] According to the U.S. Census Bureau, only 1.2 percent of undergraduate students are below the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey Report, Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002."

they are now regarded as adults in almost every phase of community life"); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) ("[we] do not believe that [a college student] should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education"); *Mazart v. State*, 109 Misc. 2d 1092, 1102, 441 N.Y.S.2d 600, 606-607 (N.Y. Ct. Cl. 1981) ("[i]t is clear from a reading of the published cases dealing with the rights of college students that the courts uniformly regard them as young adults and not children").

Finally, the Seventh Circuit also overlooked the profoundly different missions of high schools and universities. This Court has long recognized the unique status of universities as "vital centers for the Nation's intellectual life. . . ." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). *See also Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[t]he classroom is peculiarly the 'marketplace of ideas.'"). By contrast, this Court has described the status of public secondary schools as follows: "The role and purpose of the American public school system were well described by two historians, who stated: '[Public] education must prepare pupils for citizenship in the Republic. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Bethel Sch. Dist. v. Fraser*, 487 U.S. 675, 681 (1986) (citations omitted).

D. The Seventh Circuit relied on an overly mechanistic application of public forum analysis rather than the longstanding presumption that student media is not merely a public forum, but an independent forum.

After erroneously ruling that *Hazelwood* applied, the court below asked: "was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a

non-public forum or publish the paper itself (a closed forum where content may be supervised)?" *Hosty*, 412 F.3d at 735-36. This question was improper and serves only to highlight the Seventh Circuit's misunderstanding of the basic purpose and function of the student press.

In many previous cases, the freedom of the student press was simply presumed without the need to conduct a forum analysis.[6] In *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973), the Fourth Circuit gave a clear statement of the traditional standard:

> It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.

This understanding is clear from the Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), a case involving a Christian student publication that sought student fee funding. If the receipt of student fees could have converted the publication at issue into a non-public forum, then "viewpoint neutrality" would have been impossible. Administrative editorial decisions follow administrative control, and administrative control would have directly implicated the Establishment Clause. Evangelical Christian publications (such as the magazine at

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[6] *See, e.g., Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("[b]ecause of the potentially great social value of a free student voice in an age of student awareness and unrest, it would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate").

issue in *Rosenberger*) may be written, edited, and published by students acting in their private capacity as students, but the state cannot adopt such an explicitly religious point of view.

By stripping the student media of its traditional presumption of independence—or at the very least, the presumption that when a university creates a student newspaper, it is a designated public forum—the Seventh Circuit has introduced dangerous ambiguity to the rights of all student groups engaged in expressive activities.

E. The qualified immunity holding is in direct conflict with Supreme Court precedent clearly establishing prior restraint as the most primitive form of censorship the First Amendment prevents.

In *Hosty*, the Seventh Circuit held that Dean Carter, who had insisted upon prior review of a student newspaper because the administration disliked its viewpoint, enjoyed the protection of qualified immunity. The Seventh Circuit held this despite the fact that the paper's freedom of expression was protected both by the U.S. Constitution and by a contractual promise from the university.[7] The court relied on the following two-factor test from *Saucier v. Katz*, 533 U.S. 194 (2001) to reach this determination: 1) "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" and 2) "If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201.

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[7] At the time of the *Hosty* decision, the university's policy was that each funded publication "will determine content and format . . . without censorship or advance approval." *Hosty*, 412 F.3d at 737.

The Seventh Circuit's decision to grant Dean Carter qualified immunity flies in the face of literally hundreds of years of legal scholarship[8] and decades of Supreme Court precedent establishing prior restraint as the most basic form of impermissible censorship.[9] As this Court stated in the context of discussing another student-fee-funded publication, "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995). Moreover, Dean Carter's actions as an administrator directly violated this Court's holding in *Kunz v. New York*, 340 U.S. 290, 293 (1950), that a provision "which gives an administrative official discretionary power to control in advance the right of citizens to speak" is "clearly invalid as a prior restraint on the exercise of First Amendment rights."

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[8] *See* William Blackstone, *Commentaries on the Laws of England* (1765-1769); John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).

[9] *See Near v. Minnesota*, 283 U.S. 697, 718 (1931) ("[t]he fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right"). *See also New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) ("[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints"); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity"); *Niemotko v. Maryland*, 340 U.S. 268 (1950) (holding that prior restraints on speech violate the First and Fourteenth Amendments); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) ("[w]hile this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of constitutional provision").

The Seventh Circuit held that *Hazelwood* and a small number of lower court decisions obscured whether or not Dean Carter could have known she was acting improperly. However, as Judge Evans stated in his dissent in *Hosty*, "[p]rior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers . . . *Hazelwood* did not change this well-established rule." *Hosty*, 412 F.3d at 742. The majority cited no cases implying that Dean Carter might have the power of prior restraint over a student newspaper merely because the paper received mandatory student activity fees assessed to and paid by the students. In fact, the case law regarding prior review of college student media clearly establish that this is not the case.[10] *Hazelwood* was not generally understood to apply to collegiate student newspapers; an examination of William A. Kaplin and Barbara A. Lee's *The Law of Higher Education*, which is perhaps the most comprehensive text dealing with higher education law,[11] does not even mention *Hazelwood* as a case that is applicable to the collegiate student press.[12] However, Kaplin

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[10] *See, e.g.*, *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970) (holding that state university could not require prior review of student newspaper funded by student fees); *Mazart v. State*, 109 Misc. 2d 1092, 1099, 441 N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981) ("censorship or prior restraint of constitutionally protected expression in student publications at State-supported institutions has been uniformly proscribed by the courts").

[11] *See, e.g.*, Karl F. Brevitz, *Legal Resources for Higher Education Administrators and Faculty*, Change Mag., May-June 2003 ("Without question the most comprehensive resource on higher education law is this 1,023-page treatise by William A. Kaplin.. and Barbara A. Lee. . . . This book is used not only as a resource by college and university attorneys and administrators but also serves as one of the two primary texts used in the teaching of higher education law in law schools and schools of education").

[12] William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* 538-549 (3d ed. 1995).

and Lee do mention that "[a]s perhaps the most staunchly guarded of all First Amendment rights, the right to a free press protects student publications from virtually all encroachments on their editorial prerogatives by public institutions." *Id.* at 539.

Simply put, if a state official imposing prior restraint over a collegiate student newspaper flatly because the administration disliked the paper's viewpoint does not constitute a clear violation of established law regarding freedom of expression, no restriction on freedom of expression does. The Seventh Circuit itself may have obscured the constitutionality of Dean Carter's actions by its opinion in this case, but at the time Dean Carter demanded prior restraint over the *Innovator*, the violation was or at least should have been perfectly clear to anyone in her position.

II. THERE IS ALREADY A FREE SPEECH CRISIS ON AMERICA'S COLLEGE CAMPUSES AND, IF ALLOWED TO STAND, THE *HOSTY V. CARTER* DECISION WILL SERIOUSLY EXACERBATE THE EXISTING PROBLEM.

Commentators from across the political spectrum, while often disagreeing on the source, the scale, and the cause of the chilling of free speech on campus, have described the current campus environment as one where the "marketplace of ideas" is under siege.[13] Whether in the name of "toler-

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[13] *See* Forum, *A Chilly Climate on the Campuses*, Chron. Higher Educ. (Wash., D.C.), Sept. 9, 2005, at B7 ("Rarely has the climate on college campuses seemed such a cause for concern . . . What is notable is not that so many people are talking about a big chill, but that so many different people—representing very different perspectives—are doing so"). The Chronicle forum included essays from leading commentators on campus freedom including Robert O'Neil, Stanley Kurtz, Jonathan Cole, Chon Noriega, Ellen Willis, and Amy Gutmann discussing the campus chill on free speech from a multitude of perspectives.

ance," risk management, or merely peace and quiet, hundreds (if not thousands) of universities have enacted policies and engaged in practices hostile to free and open discourse over the past few decades.[14] Starting in the 1980s, colleges enacted "speech codes" under a variety of creative legal theories. Despite numerous decisions ruling these codes unconstitutional[15] and this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which indicated that viewpoint-based speech codes would be unconstitutional, the number of university speech codes actually increased through the 1990s, *see* Jon Gould, *The Precedent that Wasn't*, 35 Law & Soc'y Rev. 345 (2001). Over the past twenty years, numerous books have been written alleging an illiberal, intolerant, and/or partisan atmosphere on campus[16] in which dissenting viewpoints and unpopular groups are repressed through a variety of measures. More recently, universities have adopted highly restrictive, and sometimes absurd "speech

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[14] For examples of these policies and practices, see the Foundation for Individual Rights in Education's database of restrictive campus speech codes at www.thefire.org/spotlight. The website is constantly being updated, and currently includes 421 institutions and links directly to thousands of primary documents, including universities' actual policies, statements and handbooks.

[15] *See, e.g.*, *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993); *The UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

[16] *See, e.g.*, David E. Bernstein, *You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003); Donald Alexander Downs, *Restoring Free Speech and Liberty on Campus* (2004); Alan Charles Kors & Harvey A. Silverglate, *The Shadow University: The Betrayal Of Liberty On America's Campuses* (1998).

zone" policies restricting speech from all but small corners of the university.[17]

Thus far, the law has served to protect the collegiate marketplace of ideas from overreaching administrations, requiring policies and practices in keeping with the First Amendment and academic freedom. For example, in *Rosenberger*, this Court granted religious student groups equal access to student fee funding. In *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003), a federal court in Pennsylvania ruled Shippensburg University's speech code was unconstitutionally overbroad, and in *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004), a federal court in Texas dismissed a speech zone policy as unconstitutionally overbroad.

The *Hosty* decision, however, is a step in the opposite direction. College administrators have already demonstrated a tenacious will to censor even when the law clearly limited their ability to do so. The legal ambiguity that *Hosty* creates, the unparalleled discretion it grants college administrators, and the legal protection it provides to administrators who censor all threaten to dramatically worsen the campus free speech crisis.

If allowed to stand, *Hosty* will have numerous, specific, predictable, and far reaching negative consequences for free speech and robust debate on America's college campuses. It is no exaggeration to say that the *Hosty* opinion threatens the existence of the independent collegiate media. Universities have not shown great tolerance for the free press. If there is no longer a presumption of independence or of public forum status when a public university establishes a student news-

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[17] *See generally* Mary Beth Marklein, *Students are Giving Colleges a Lesson in Free Speech*, USA Today, May 19, 2003; David L. Hudson Jr., *Free Speech Zones*, *available at* http://www.firstamendmentcenter.org/speech/pubcollege/topic.aspx?topic=free-speech_zones.

paper, there should be no doubt that administrators who wish to censor will take advantage of this ambiguity. Public universities will be able to argue that any paper that receives any kind of benefit—whether financial support or simply the use of office space—from the university is subject to administrative control. If past experience is any guide, colleges will pay lip service to the importance of student press freedom, but they will quickly take advantage of any legal means available to punish or control student newspapers that anger or offend students or administrators. For example, in a memorandum to all California State University presidents written only ten days after the *Hosty* decision, California State University General Counsel Christine Helwick wrote that:

> [w]hile the Hosty decision is from another jurisdiction and, as such, does not directly impact the CSU, the case appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers, provided that there is an established practice of regularized content review and approval for pedagogical purposes.[18]

In this same way, *Hosty* threatens the existence of independent student groups. If the primary question under *Hosty* is whether a student group is in some way "subsidized," any group that receives any sort of benefit or student fees could be threatened with administrative control. The possibility that a court might later determine that the student group or publication was entitled to some form of public forum status would hardly protect the overwhelming majority of these groups that are neither willing nor affluent enough to mount a legal defense.

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[18] Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf.

This case also re-opens issues relating to collegiate liability for student media and student groups formerly considered settled. It also allows administrators virtually unlimited freedom to experiment with censorship above and beyond even the broad discretion granted to them under *Hosty*. Finally, there is no reason to believe this holding will remain limited to public colleges—private colleges that promise free speech to their students tend to base their own speech policies on First Amendment standards.[19] *Hosty v. Carter* will have reverberations from the community college to the Ivy League. Administrators will impose the "intellectual strait jacket" that this Court has long feared, and the consequences will be profound. As FIRE co-founder Alan Charles Kors once said, "A nation that does not educate in freedom will not survive in freedom, and will not even know when it is lost."[20]

CONCLUSION

For all of the reasons stated above we ask that the Supreme Court grant the writ of certiorari.

Respectfully submitted,

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October 19, 2005

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[19] Kaplin and Lee even suggest "private institutions may want to adhere to much the same guidelines for promulgating rules as are suggested for public institutions, despite the fact they are not required to do so by law." Kaplin and Lee, *supra* note 12, at 464-465.

[20] Alan Charles Kors, Keynote Address to Phi Beta Kappa of Delaware County, (Oct. 13, 2004).

APPENDIX

APPENDIX

LIST OF PARTIES TO BRIEF *AMICI CURIAE*

The Foundation for Individual Rights in Education, Inc. ("FIRE"), is a non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code, interested in promoting and protecting academic freedom and First Amendment rights at American institutions of higher education. FIRE receives hundreds of complaints each year concerning attempts by college administrators to justify punishing student expression through misinterpretations of existing law. FIRE believes that, for academic freedom and robust collegiate expression to survive, the law must remain clearly and vigorously on the side of free speech on campus.

The Coalition for Student & Academic Rights ("CO-STAR") is a national network of lawyers that helps college students and professors with their legal problems. CO-STAR offers a wide range of services, including legal counseling, mediation, legal education and advocacy. CO-STAR is based in Bucks County, Pennsylvania and is a 501(c)(3) corporation.

Feminists for Free Expression (FFE) is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce expressive materials free from government intervention. Originally organized in 1992 in response to the many efforts to solve society's problems by book, music or movie banning, FFE provides a leading voice opposing state and national legislation that threatens free speech; defends the right to free expression in court cases, including those before the Supreme Court; supports the rights of artists whose works have been suppressed or censored and provides expert speak-

ers to universities, law schools and the media throughout the country.

The First Amendment Project is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

Ifeminists.net (a site for individualist feminism) is one of the longest-standing feminist sites on the Internet—which challenges many of the ideological assumptions that are common on campus today, especially in Women's Studies Departments. Indeed, many of our subscribers are university students. If the debate and dialogue upon which intellectual growth depends is to occur, then it is essential that student publications be allowed freedom of speech and not be censored by university authorities who may have a vested interest in the status quo. Ifeminists believes that the decision reached by the Seventh Circuit Court of Appeals in *Hosty v. Carter* will lead to unconstitutional censorship of student journalism and, therefore, hopes the Court will intervene to overturn this dangerous precedent.

The National Association of Scholars is an organization of professors, graduate students, college administrators, trustees, and independent scholars, committed to rational discourse as the foundation of academic life in a free and democratic society.

The Leadership Institute identifies, recruits, trains, and places conservatives in the public policy process. The Institute's Campus Leadership Program launches and maintains independent conservative groups and newspapers at colleges and universities nationwide, and works with over 300 now-active organizations on campuses in all 50 states. Independence and freedom of expression are essential to these

organizations, as they commonly face attempts at administrative censorship.

Accuracy in Academia, a non-profit research group based in Washington, D.C., wants colleges and universities to return to their traditional mission—the quest for truth. To this end, AIA focuses on the use of classroom and/or university resources to indoctrinate students; discrimination against students, faculty or administrators based on political or academic beliefs; and campus violations of free speech. AIA publishes in its monthly newsletter, Campus Report, and posts on its websites, www.academia.org and www.campusreportonline.net, hundreds of stories each year that present the evidence behind these complaints.

The Individual Rights Foundation ("IRF") litigates civil rights and First Amendment issues and educates the public about the importance of the First Amendment's free speech and associational guarantees. Founded in 1993, the IRF is a nonprofit organization that represents parties to litigation and files amicus curiae briefs involving significant civil rights and First Amendment issues. The IRF is committed to the principle of equality of rights for all persons, and to the goal of protecting fundamental civil rights and First Amendment rights.

Students for Academic Freedom ("SAF") is a national coalition of independent campus groups dedicated to restoring academic freedom and educational values to America's institutions of higher learning. SAF is committed to the goal of promoting intellectual diversity at colleges and universities. SAF seeks to secure greater representation for underrepresented ideas and to promote intellectual fairness and inclusion in all aspects of the curriculum and the campus public square.

The American Council of Trustees and Alumni (ACTA) is a 501(c)(3), tax-exempt, nonprofit, educational organization

committed to academic freedom, excellence and accountability at America's colleges and universities. ACTA works with college and university trustees to safeguard the free exchange of ideas, support liberal arts education, uphold high academic standards, and ensure that the next generation receives an open-minded, high quality education at an affordable price. ACTA has members from over 400 colleges and universities. Its quarterly publication, *Inside Academe*, goes to over 12,000 readers, including 3,500+ college and university trustees.

Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

No. 05-377

IN THE

Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA,

Petitioners,

v.

PATRICIA CARTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION AND THE ASSOCIATION OF SCHOOLS OF JOURNALISM AND MASS COMMUNICATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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OCTOBER 2005

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The Association for Education in Journalism and Mass Communication, the Association of Schools of Journalism and Mass Communication, the Northwestern University Medill School of Journalism, the Pennsylvania Center for the First Amendment, the Pennsylvania State University College of Communications, the Thomas Jefferson Center for Free Expression, the University of Georgia Henry W. Grady College of Journalism and Mass Communication, the University of Missouri School of Journalism, the Annenberg School for Communication of the University of Pennsylvania, and the S.I. Newhouse School of Public Communications at Syracuse University respectfully submit this brief as *amici curiae* supporting Petitioners Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba.[1] The parties have consented to the filing of this brief, and letters indicating their assent have been submitted with this brief.

INTEREST OF THE *AMICI CURIAE*

The *amici* are associations of professors and leaders of journalism and mass communications schools and departments, as well as university journalism schools and centers for the study of the First Amendment. *Amici* have a strong interest in the aplication of the First Amendment to student newspapers at colleges and universities. Collectively, *amici* have broad and deep expertise in teaching journalism at the college level. As university educators, *amici* are qualified to address the pedagogical purposes served by uncensored college

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[1] Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

newspapers. *Amici* also are knowledgeable about the role that campus newspapers play in their communities and how best to prepare their students to become professional journalists.

The Association for Education in Journalism and Mass Communication has a membership of about 3,400. Of these, more than 3,000 teach and conduct research at United States universities and colleges. The AEJMC Constitution states that the association will improve education in journalism and mass communication by "supporting freedom of communication consonant with the ideal expressed in the First Amendment to the U.S. Constitution." Freedom of expression at university and college student publications is important to AEJMC members because many work with student journalists in classrooms and as advisers to student publications.

The Association of Schools of Journalism and Mass Communication is a national organization of nearly 200 leaders, including deans, directors, and chairs of departments, schools and colleges that graduate the majority of new journalists in the United States from their professional degree programs. The association supports freedom of expression for everyone, and especially for student journalists, at college and university newspapers, yearbooks and magazines at all institutions throughout the nation.

Founded in 1921, Northwestern University's Medill School of Journalism is both an undergraduate and graduate program whose mission is to provide rigorous professional education and training for a full range of positions in news, information and commercial communications, to lead thought in the field of journalism and to assist its students in finding employment. The school, comprising nearly 700 undergraduate journalism students, more than 150 graduate students in journalism, and another 80 studying integrated marketing

communications, enhances student knowledge of the environment of journalism, media ethics and the role of the media in a diverse society. Medill has 46 full-time faculty, teaching facilities in Evanston, Chicago and Washington, and a global program that each year trains 40 graduate journalism students abroad.

Penn State's College of Communications, which enrolls more than 3,300 undergraduate majors and 80 master's and doctoral students, is the largest nationally-accredited program of its kind in the country. The university offered its first journalism writing course in 1911. The Department of Journalism was established in 1929 and was in the initial group of institutions nationally accredited in 1948. In 1985, the School of Communications was formed, bringing together existing programs in journalism, advertising, public relations, telecommunications, media studies and film. Communications achieved college status in 1995. The College strives to educate students for citizenship in a society in which communication and information are major commodities and the basis of the democratic process. The College's 62-person full-time faculty is noted for its strong blend of professional and academic backgrounds and is dedicated to integrated excellence in teaching, research and outreach. The College boasts a strong array of special programs, including the Washington, D.C., Communications and Democracy Semester, the Foster Conference of Distinguished Writers and several endowed lecture series, many of which focus on ethics, social responsibility and freedom of expression. Penn State students participate in a variety of on-campus media opportunities by working at the century-old Daily Collegian, an independent newspaper with a 17,000 daily circulation; at ComRadio, a Webcasting station with a news and sports format; and on a weekly 30-minute student television news show that is aired on Penn State's public broadcasting station. Each year, nearly 500

Communications students enroll in for-credit off-campus internships across the country and abroad.

In February 1992, Penn State established the Pennsylvania Center for the First Amendment to promote awareness and understanding of the principles of free expression to the scholarly community and the general public. The Center's goals support Penn State's outreach mission of providing the commonwealth and the nation with education, research and service. The Center carries out numerous projects designed to accomplish its mission. Faculty members involved in the enterprise have published books and articles on First Amendment topics. Numerous op-ed pieces have appeared in the nation's most-respected newspapers. The Center's members regularly provide commentary to newspapers and magazines and on radio and television programs as well as give speeches to organizations that wish to learn more about First Amendment freedoms. Additionally, the Center serves as a media resource, providing assistance on access issues and related topics. It further provides expert testimony to courts and legislative bodies grappling with First Amendment issues. The Center gives students the opportunity to engage in research projects under the supervision of its co-directors. The Pennsylvania Center for the First Amendment, which is housed in the College of Communications, is co-directed by attorneys Robert D. Richards and Clay Calvert.

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan institution dedicated solely to the protection of the First Amendment rights of free speech and free press. For more than ten years the Center has participated actively in the litigation of First Amendment issues and has filed briefs *amicus curiae* in federal and state courts, including this Court. Many of those cases involved questions of academic freedom and free speech within the academic community.

The Grady College at the University of Georgia is one of the oldest and most distinguished communication programs in the country. Its three departments – journalism, telecommunications, and advertising and public relations – are consistently ranked among the very best in the nation. Our focus on providing the highest possible quality of education drives the Grady College's success and the success of its alumni. It is our privilege to prepare the next generation of leaders in journalism and communication, and it is our commitment to emphasize education rather than to simply provide training. The distinguished faculty is critical to the success of our mission. Not only do they provide students with the best in professional training, they also instill within them a sound understanding of the duties, responsibilities and obligations they will have as future journalists and communication professionals within a democracy. The Grady College is home to the Peabody Awards, internationally recognized as one of the most prestigious awards for excellence in electronic media.

The University of Missouri School of Journalism is the world's first journalism school, founded by Walter Williams in 1908. Williams, the first dean of the school and later the president of the University of Missouri, believed that journalism education should be professionalized and provided at a university. Today, the Missouri School of Journalism consistently ranks at the top of professional surveys of journalism schools. At Missouri, real-world media experience is part of the curriculum. The Missouri School of Journalism educates students for careers in journalism, advertising and other media fields by combining a strong liberal arts education with unique hands-on training in professional media. The School publishes the Columbia Missourian, the weekly morning newspaper for the Columbia region, Adelante, a bilingual monthly newsmagazine, Vox magazine and the Global Journalist. It also operates Station KBIA(FM),

one of the most successful noncommercial radio stations in the country, Station KOMU(TV), the Columbia NBC affiliate, the only university-owned commercial television station in the United States that uses its newsroom as a working lab for students, and Missouri Digital News, an Internet-based news service

When publisher, diplomat and philanthropist Walter Annenberg announced the founding of the Annenberg School for Communication (ASC) at the University of Pennsylvania in 1958, he described its purpose with the following words:

> Every human advancement or reversal can be understood through communication. The right to free communication carries with it responsibility to respect the dignity of others – and this must be recognized as irreversible. Educating students to effectively communicate this message and to be of service to all people is the enduring mission of this school.

Over the ensuing 45 years, ASC has attempted to remain true to this mission, while also adjusting to changes affecting the School, the University and the larger educational, scholarly and professional environments. In ASC's current incarnation it does so through an emphasis on four central goals. First, producing and disseminating cutting-edge scholarly research designed to advance the field's theoretical and empirical understanding of the role of communication in public and private life. Second, producing high-quality applied research designed to advance the public's understanding and effective use of communication (from face-to-face conversations to mass media), and policy-makers' ability to create a media environment that fosters the personal and collective development of its citizens. Third, providing a first-class liberal arts education to

undergraduates, designed to help make them better consumers and producers of public information, strengthening their understanding of the role of communication in their personal, professional and civic lives, and preparing them for private and public-sector leadership positions in communication-related fields. And fourth, educating Ph.D. graduate students in the theories, substance and methods of communication research and placing them in leading academic and professional positions in the field.

The S.I. Newhouse School of Public Communications at Syracuse University is one of the nation's premier schools of mass communication. The Newhouse school, which traces its roots to Syracuse University's School of Journalism (founded in 1934), embraces virtually every known form of information dissemination from print journalism to broadcast journalism to online communication and from advertising and public relations to photography and film. The more than 60 faculty members come primarily from the profession, men and women for whom teaching is the top priority. Among them are international experts in such fields as First Amendment law, the effects of television on children, the impact of television on popular culture, and the effectiveness of advertising. The mission of the Newhouse School is to prepare students for productive and rewarding careers in public communications while at the same time educating them about the societal roles and obligations of their respective fields. Today the School offers majors in photography, graphics, magazine journalism, broadcast journalism, public relations, advertising, and television-radio-film as well as its original focus, newspaper journalism. It is also the site of several research centers dedicated to the study of communication.